Supreme Court, U. S.
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NO. _____

* * *

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

* * *

THE STATE OF TEXAS,

Petitioner

V.

JOSEPH STANLEY FAULDER,

Respondent

* * *

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

* * *

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QUESTION PRESENTED

Has an adult suspect who, during custodial interrogation after being fully and frequently apprised of his rights, expresses a desire for a "couple of days to get this straight" or "to think about this", thereby invoked his right to remain silent under the Fifth Amendment as interpreted by *Miranda v. Arizona*, 484 U.S. 436 (1966), in a manner intelligible to a reasonable auditor thus requiring the cessation of further interrogation and the suppression of his confession obtained shortly thereafter following his written waiver of this right?

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The Petitioner State of Texas respectfully prays that a writ of certiorari issue to review the judgment of the Texas Court of Criminal Appeals entered in these proceedings on February 6, 1980.

OPINIONS BELOW

The presently unreported majority and dissenting opinions of the Texas Court of Criminal Appeals overruling the State's motion for rehearing, in *Faulder v. State*, No. 60,554 are set forth as appendix A to this petition. The Court's order of February 26, 1980 denying the State's motion for leave to file a second motion for rehearing is set forth as appendix B. The various presently unreported opinions of that court denying the application of the respondent herein for a writ of prohibition and granting, for thirty days, the state's motion for a stay of mandate, delivered July 2, 1980, are set forth as appendix C.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under Title 28, United State Code, section 1257(3) to review a judgment of the Texas Court of Criminal Appeals which was delivered and entered on February 6, 1980.

The present petition for writ of certiorari is filed within the time limits as extended by Mr. Justice Powell by his order of May 21, 1980 to extend to and include July 25, 1980. The delay in filing this petition was necessitated by the Court of Criminal Appeals' consideration of the question of the state's right to seek such review and the application by the respondent herein for a writ to prohibit the state from doing so. On July 2, 1980 this issue was decided by the Court of Criminal Appeals in favor of the State. See appendix C.

The judgment, review of which is sought, is a final decision rendered by the highest court of the State of Texas having criminal jurisdiction and is one

interpreting rights under the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution. Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War of public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment XIV, in relevant part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

1. Statement of the Proceedings

Respondent was convicted upon trial by jury in the 188th District Court of Gregg County, Texas of capital

murder, the indictment having charged that he killed the victim while in the course of committing or attempting to commit aggravated robbery. At the punishment hearing the jury answered each of the three questions set out in Article 37.071 of the Texas Code of Criminal Procedure in the affirmative, and respondent was sentenced to death.

Respondent's appeal to the Texas Court of Criminal Appeals did not directly challenge the sufficiency of the evidence but did, *inter alia*, claim error in the decision of the trial judge to admit into evidence his confession to the crime which respondent claimed was taken in violation of *Miranda* rights. The trial judge's decision came after a lengthy suppression hearing at which the respondent testified. Initially, the Court of Criminal Appeals unanimously agreed with respondent and reversed and remanded. The state moved for rehearing and the Court of Criminal Appeals reconsidered and delivered a new opinion, with three dissenters, overruling that motion on the grounds that respondent's confession had been given after he had invoked his right to silence which right had not been honored, and that he had not subsequently waived that right.

2. Facts Material to the Question Presented.

On the morning of July 9, 1975, the bound and gagged body of Inez Phillips, a 75 year old widow, was discovered in the bedroom of her ransacked home in Gladewater, Texas. The back of her skull had been crushed by a blunt instrument and a large knife had been driven deep into her chest. No suspect was known to the authorities.

On April 18, 1977, the respondent was arrested in the State of Colorado upon a warrant charging him with theft over $200 in an unrelated incident alleged to have been committed in Gregg County on July 4, 1975. After being advised by a Colorado judge of his rights, including that to appointed counsel (471-82), respondent

waived extradition and was returned to Gregg County on April 20. The next day he was advised of his rights regarding the theft charge by a magistrate and acknowledged the warnings by his signature. He did not request an attorney because he planned to enter a guilty plea and felt he did not need one (485). The following day, April 22, he was interviewed by Captain Bill Roach of the Gregg County Sheriff's Department and Texas Ranger Glen Elliott. He was advised of his *Miranda* rights and, after a brief discussion of the theft, informed that he was a suspect in the capital murder of Mrs. Phillips. (Respondent had come under suspicion because of information provided by one James Moulton who had worked at the victim's home and been aware of the presence there of a floor safe; information he had given respondent some weeks prior to the murder.) Respondent was asked if he would agree to a polygraph examination. He did, and arrangements were made for one to be conducted at 2:00 p.m. on April 25 at the headquarters of the Department of Public Safety, in Tyler, Texas. On that date, at approximately the appointed time, the polygraph operator, Officer Marvin McLeroy conducted a "pre-test interview" and explained the operation of the test and that it was voluntary. He also told respondent that "if he knew he could not pass the test that my advice to him would be not to take the test." (367) Respondent then refused to sign the polygraph consent form, and Officer McLeroy asked him "Well, do you want to talk to me about why you're down here?" The response was "I just as well talk to you; I've talked to just about everybody else." (394) Officer McLeroy then read respondent his *Miranda* rights. In the course of his thirty minute conversation with Elliott, respondent indicated that "he would like to have a couple of days to get this straight in his mind." (296) Ranger Elliott left to get coffee and Captain Roach entered the room and spoke to respondent for about fifteen minutes during which time he indicated that "he had knowledge of the crime...but he wasn't ready to talk

about it." (299-300) Officer McLeroy's response to this was to say: "You don't need a couple of days to get this straight. You know right now, today, as to whether or not you could pass a polygraph test; isn't that correct?" He said, "Yes." (405) At about 4:30 p.m. Captain Roach brought respondent a piece of paper on which were written the names of other suspects in the robbery-murder. This was given to respondent to read while Captain Roach asked him about each. When Captain Roach reached the name of the woman later named in respondent's confession as his accomplice, respondent said "I can't at this time tell you about it, but if you'll give me a piece of paper, I'll try to write it down." Captain Roach did, and respondent at about 5:00 p.m. wrote a brief confession, handed it to Captain Roach and "told him . . . to read that . . ." and said "I can talk about it now." (307) Captain Roach then gave respondent another waiver of rights form which respondent read and signed (at 5:47 p.m.) after reading aloud, at Captain Roach's request, the line "an attorney would be called to assist me and no question would be asked me until the attorney arrived." (428-29) Respondent then proceeded to draw diagrams of the victim's home and to dictate a full confession which was typed for his signature which was affixed at 7:22 p.m.

The trial judge found that respondent had made no request for counsel and the Court of Criminal Appeals was bound by that finding. Nor was there any dispute that defendant had received multiple repetitions of his rights, that he understood them, that he had been allowed to drink, smoke and use the restroom, that firearms had not been displayed and that respondent had neither been mistreated nor been subjected to overt threats. (466, 481-82, 487, 499) Nevertheless, the court held that respondent had invoked his right to silence by his request for time and did not subsequently waive the rights so invoked. Thus, the confession, the indispensable piece of evidence at respondent's trial,

without which no retrial for this crime will be possible, was to be suppressed.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

1. The Texas Court of Criminal Appeals has Improperly Interpreted *Miranda v. Arizona*, So As To Ignore The Requirement That A Suspect's Invocation of His Right To Silence Be Expressed In Some Manner Which Would Be So Understood By A Reasonable Person.

> "Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." *Miranda v. Arizona*, 384 U.S. 436, 478 (1966).

In *Miranda v. Arizona*, *supra*, this Court expressed its concern that the process of custodial interrogation posed dangers to the protection of a defendant's Fifth and Fourteenth Amendment privilege against compulsory self-incrimination which required special procedural safeguards. These included the requirement that prior to such questioning the state warn the accused of his right to remain silent and of his right to have counsel, retained or appointed, present during interrogation. Following such warnings, the procedure to be observed by the interrogating officers is clear.

> "If the individual indicates in any manner, at any time prior or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the produce of compulsion, subtle or otherwise." 384 U.S. 436, 473-74.

This case does not bring into question the values underlying the *Miranda* decision nor the prophylactic techniques set forth therein. It does sharply pose the issue of how a peace officer and a reviewing court are to recognize that a suspect has indicated a desire to remain silent. As is indicated by the quotation from *Miranda* which opens this section, this Court recognized the importance of interrogation and confessions to the apprehension and conviction of criminals. In three recent cases this Court has reiterated this view and rejected expansive interpretations of *Miranda* which would have, as in the instant case, sharply restricted the use of statements given by suspects in custody. *Rhode Island v. Innis*, ____ U.S. ____, 100 S.Ct. 1682 (1980); *Fare v. Michael C.*, 442 U.S. 707 (1979); and *North Carolina v. Butler*, 441 U.S. 369 (1979).

The *Miranda* opinion is, and must be, predicated on some act of communication by the suspect. The interrogating officer must be apprised in some manner of the suspect's desire to remain silent so that he may cease the interrogation or attempt, should the meaning of the suspect's statements be unclear, to clarify his desires. See *United States v. Rodriguez-Gastelum*, 569 F.2d 482 (9th Cir.), cert. denied, 436 U.S. 919 (1978). Without a requirement of communication the peace officer is left in a world of half-light, without guidance, and in constant danger of inadvertently jeopardizing the case against the suspect and, thereby, the vindication of our society's criminal proscriptions. Trial judges required to rule on motions to suppress statements taken in alleged violation of the *Miranda* rules will be similarly confused.

As was recently noted in *Nash v. Estelle*, 597 F.2d 513 (5th Cir. 1979)(en banc), *cert. denied*, ____U.S. ____, 100 S.Ct. 485 (1980), the *Miranda* opinion anticipated situations of unclear communication by a suspect. There this Court quoted with approval the letter of the Solicitor General describing the interrogation practices of the Federal Bureau of Investigation including:

> "If [a suspect] is indecisive in his request for counsel, there may be some question on whether he did or did not waive counsel. Situations of this kind must necessarily be left to the judgment of the interviewing agent." 384 U.S. 436, 485.

In a very similar context in *Frazier v. Cupp*, 394 U.S. 731, 739 (1969), this Court recognized the difficulties posed by an ambiguous invocation of rights and refused to treat such as adequately informing the officer so as to require the cessation of interrogation. There the suspect had said "I think I had better get a lawyer before I talk anymore." The officer replied "you can't be in any more trouble than you are in now." *Id.*, at 738. Questioning continued and the suspect answered, yet this Court found the suspect's invocation of his right to counsel inadequate. Here, the suspect's statement that he would like a couple of days to think about the matter was taken by the officers as a mere evasion, similar to "I don't remember" or "I don't know", or an effort to avoid implicating others. Such evasions from a suspect who has been fully advised of his rights and is knowledgeable about their exercise cannot be viewed as invocations of the right to silence if, statements given during custodial interrogation are to continue to contribute to the fact-finding process in the manner envisioned by *Miranda*, *Butler* and *Fare*.

It is posited that *Miranda* requires an invocation of rights which would be so understood by a reasonable person under the attendent circumstances. Here, respondent had been advised of his right to silence and to counsel by a magistrate on April 21, by the police on April 22, and twice more on April 25, before making his statement about "a couple of days." He understood these rights and twice specifically declined counsel. His request for "a couple of days" carried no suggestion that he was operating under a misunderstanding of the nature and extent of his rights or the manner in which

they were to be exercised as was arguably present in *Butler*, ("I will talk to you but I am not signing any form." 441 U.S. 369, 371) or *Fare* where the juvenile requested that his probation officer be present. The decision of the Court of Criminal Appeals that the request for "a couple of days" constituted an invocation of the right to silence can only be seen as ignoring the requirement of *Miranda* that the suspect must invoke his rights in an intelligible manner.

2. In Finding That Respondent Did Not Waive His Rights Under *Miranda v. Arizona* the Texas Court of Criminal Appeals Has Misinterpreted The Decisions of This Court.

If respondent's ambiguous request for "a couple of days" were interpreted as an invocation of his right to silence, his subsequent responses to questioning and express written waiver was, under the totality of the circumstances, a knowing and voluntary decision to forego that right. Although it is recognized that when a suspect has invoked his right to silence the government bears a "heavy burden . . . to demonstrate that the defendant knowingly and intelligently waived his privilege", *Miranda, supra*, 384 U.S. at 475, the State has done so here.

Respondent's statements came after repeated warnings in an atmosphere free of physical or other coercion and approximately one and a half hours after the alleged but totally ambiguous invocation of his right to silence. Respondent's decision to make a statement appears to have been triggered by the written list of other suspects which included the name of the woman implicated by his subsequent confession as his accomplice. Presentation of such additional evidence has been found by at least two Circuit Courts of Appeal to be legitimate law enforcement technique which is not precluded by *Miranda*'s ban on further interrogation. *United States v. Pheaster*, 544 F.2d 353 (9th Cir.1976),

cert. denied, 429 U.S. 1099 (1977), and *United States v. Hodge*, 487 F.2d 945 (5th Cir. 1973). Respondent's writing of a brief confession followed by his signing of his second written waiver of the day, was done by a mature adult who had acknowledged that he understood the rights which had been so frequently repeated to him and that he was neither threatened nor promised anything nor mistreated in any way. The decision by the Court of Criminal Appeals that respondent's waiver was not effective represents a gross misreading of the decisions of this Court in *Fare v. Michael Co.*, 442 U.S. 707 (1979), and *North Carolina v. Butler*, 441 U.S. 369 (1979).

3. The Decision of The Court of Criminal Appeals Rests Solely on Federal Constitutional Authority and Conflicts With Respect To A Matter Of Great Importance Not Only With The Decisions of This Court But Also With The Decisions of Other State Courts of Last Resort and A Federal Court of Appeals.

As has been indicated in Sections 1 and 2 *supra*, the decisions of the Court of Criminal Appeals both as to the respondent's alleged invocation of his right to silence and the absence of effective waiver of that right are misinterpretations of the controlling decisions of this Court. In reaching its decision the Court of Criminal Appeals relied solely upon federal constitutional authority. The state cases cited in support of its view, *Ochoa v. State*, 573 S.W.2d 796 (Tex.Ct.Crim.App. 1978) and *Hearne v. State*, 534 S.W.2d 703 (Tex.Ct.Crim.App. 1976), are both interpretations of *Miranda* and contain no independent state grounds for decision.

The misinterpretations by the Court of Criminal Appeals, if uncorrected, would have the effect in practice of violating the clear principle that "a State may not impose greater restrictions as a matter of federal constitutional law when this Court specifically

refrains from imposing them." *Oregon v. Hass*, 420 U.S. 714, 719 (1975). If uncorrected, the Fifth Amendment will have in practice a different meaning on each bank of the Sabine River, and law enforcement officers in Texas, our nation's third most populous state, will be forced to operate under constraints more severe than are constitutionally required; a consideration of greater importance practically, if not emotionally, than the fact that a particular, brutal, self-confessed and convicted murderer will escape punishment.

Moreover, the decision of the Court of Criminal Appeals which negates the requirement that the invocation of *Miranda* rights be intelligible as such to a reasonable auditor is in conflict with the decision of the Fifth Circuit Court of Appeals in *Nash v. Estelle*, 597 F.2d 513 (1979)(*en banc*) *cert. denied*, ____ U.S. ____, 100 S.Ct. 485 (1980), as well as with decisions of the Supreme Courts of Arizona, Kansas, Ohio, and Virginia. See *State v. Knapp*, 114 Ariz. 531 562 P.2d 704 (1977), *cert. denied*, 435 U.S. 908 (1978)(the point at issue being raised, as here, in the context of a death penalty case), *State v. Nichols*, 212 Kans. 814, 512 P.2d 329 (1973), *State v. House*, 54 Ohio St.2d 297, 376 N.E.2d 588 (1978), and *Lamb v. Commonwealth*, 217 Va. 307, 227 S.E.2d 737 (1976).

CONCLUSION

For the foregoing reasons, petitioner submits that a writ of certiorari should issue to review the decision of the Texas Court of Criminal Appeals.

Respectfully submitted,

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APPENDIX A

JOSEPH STANLEY FAULDER, Appellant

NO. 60,554 v. Appeal from GREGG County

THE STATE OF TEXAS, Appellee

OPINION ON STATE'S MOTION FOR REHEARING

On original submission a unanimous Court reversed this cause on the ground that the written statement confessing to this capital murder was taken under coercive circumstances rendering such statement inadmissible under the authority of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 313 (1975), Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975) and cases decided by this Court. We denied leave to file the State's Motion for rehearing; however, the factual recitation and consequently, the legal conclusions evidenced by the opinion on original submission were vigorously questioned by the dissent to the denial of the State's leave to file and a majority of this Court therefore ordered a stay of the mandate, as well as the State's leave to file.

The only seriously disputed fact issue revealed by this record is whether appellant advised the interrogating officers that he desired the advice of counsel. Because the trial court as the sole trier of fact, found that no such request was made, this Court is not at liberty to disturb such finding. McKittrick v. State, 541 S.W.2d 177 (Tex.Cr.App. 1976). All of the officers observed through a one-way mirror the conversations had by each of the other officers with appellant, unless otherwise indicated. The following recitation is of relevant facts and circumstances adduced at the hearing on the motion to suppress which are substantially uncontradicted unless so designated.

On April 20, 1977, appellant was extradited from Colorado on a warrant for his arrest for the offense of

theft in the amount of $320.00. The next morning, he was taken before Justice of the Peace Charles Cashell, who advised appellant he was charged with the offense of theft, read appellant his magistrate's warning and set his bond at $50,000.00. Appellant understood the warning and did not at that time request the assistance of counsel because he intended to enter a guilty plea to the theft and felt he did not need one. The next morning, a Friday, appellant met with Captain Bill Roach of the Gregg County Sheriff's Department and Department of Public Safety Texas Ranger Glen Elliott in Roach's office in the Gregg County Courthouse. He was advised of his *Miranda* rights and a brief discussion of the theft offense ensued.

According to Elliott, he and Roach "then informed [appellant] that [they] were investigating a homicide in Gladewater . . . , which was a capital offense, and that [they] were interested in his activities on or about July 8, 1975." Appellant advised the officers of where he thought he had been, and they in turn asked whether he would be willing to submit to a polygraph examination regarding the capital murder. Upon appellant's agreement, Elliott arranged the polygraph for April 25, the following Monday, at 2:00 p.m. in Tyler. Roach, Elliott and appellant arrived in Tyler at approximately 1:45 p.m. on the appointed day after a forty five minute trip in which the murder was not discussed.

On arrival at D.P.S.[1] headquarters in Tyler, appellant was placed in a holdover cell for a short while during which Elliott and Roach briefed the polygraph examiner, Officer Marvin McLeroy, on the subject to be examined. McLeroy then brought appellant into the polygraph room[2] and spent approximately 30 minutes

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[1]Department of Public Safety.

[2]Testimony of McLeroy described the polygraph room thus:

with appellant completing a "pre-test interview" in which he obtained personal data, such as appellant's general health, physical condition that morning, education, criminal record and the like. McLeroy then explained the process of a polygraph test and advised appellant:

> I told him that polygraph tests were simply a voluntary test, that he could not be forced to take it, that if he knew that he could not pass the test that my advice to him would be to not take the test. I told him that there were basically three things which could probably make him fail the polygraph test. I told him, number one, that if he actually did do what it was that he was suspected of doing that he would probably fail the test; that if he knew for a fact who did do what he was suspected of doing or if he was

---

Q: And your statement is that that room is isolated from the rest of the building.

A: That room is isolated, closed off, yes, sir.

Q: O.K. And it's closed off to the extent that there's a one-way mirror, a lie detector table, an inter-com system between the two rooms and it's actually towards the back. You have to walk through the lab to get back to it, do you not?

A. You walk down a hall.

Q: Walk down a hall and the lab is on the right-hand side?

A: Yes, sir.

Q: So, that's not a place where the public freely wanders around getting driver's license is it?

A: That's correct.

Q: All right. Would you then say that the interrogation of the Defendant in the lie detector room was in a pretty secluded, out-of-the-way spot?

A: Yes.

> intentionally withholding knowledge from me about, or from the investigators about what he was accused of doing, that this would probably make him fail this polygraph test. At this point in time the subject indicated to me that he better not take the polygraph test, that it was his desire, that it was his wish that he did not take the polygraph test.

Appellant refused to sign the polygraph consent form.

McLeroy then asked appellant whether he would talk to him about why he, appellant, was there. According to McLeroy appellant replied: "I just as well talk to you; I've talked to just about everybody else." McLeroy then read appellant his rights and apparently it was at this point that a discussion of the electric chair commenced, the content of which was disputed.[3] According to McLeroy, he then began interrogation of appellant regarding the murder which lasted for approximately 30 more minutes. McLeroy was asked:

> Q: He didn't talk to you about that, did he? So, in essence, he did not . . . talk to you or answer any questions of yours concerning this accusation, did he?
>
> A: No.

McLeroy left appellant in the room and explained to the other officers that appellant had refused to consent to taking the polygraph. Ranger Elliott then went into the room with appellant.

---

[3]According to appellant, McLeroy described for him the physical effects on the human body of the administration of electrocution. While admitting he discussed the electric chair with appellant "prior to the first interview," McLeroy denied that its effects on the human body were discussed, and testified that the discussion was based upon his asking appellant what he thought should happen to the person who committed the murder.

Elliott warned appellant and asked him why he did not want to take the polygraph. According to Elliott, appellant "said he'd never had a test before and he wasn't sure it was the right thing to do." Elliott then told appellant he was investigating this capital murder and asked about appellant's associates in Longview. Elliott testified:

> I tried to get better acquainted with him. I tried to get a little bit closer to him so he could talk freely to me and during this conversation *he indicated to me that he would like to have a couple of days to get this straight in his mind, and I talked to him.*

On cross examination, Elliott was asked:

> Q: Did you ask him any facts concerning this capital murder in Gladewater?
>
> A: Yes, sir, I asked him.
>
> Q: *Did he want to talk to you about it at that time?*
>
> A: He indicated that he knew about the murder and that he just, but *he wanted to wait a little but, a little while, a couple of days to put it down.*
>
> Q: *He wanted to wait a couple of days in regard to giving a statement about it?*
>
> A: *That's the way I took it.*

After 20 to 30 minutes of interrogation in which appellant continued to give no incriminating information, Elliott left.

Captain Roach then entered the polygraph room and orally advised appellant of his rights. According to Elliott[4], who was observing through the mirror:

---

[4]The witness Roach gave very little testimony about this interview other than it was short, lasting about 15 minutes.

> [This interview] was along the same lines. Stan had already -- Mr. Faulder had already indicated to us that he -- to me that he had knowledge of the crime that we were talking about, *but he wasn't ready to talk about it. And Mr. Roach started* his interview along the same lines that I did, *to get better acquainted with him and trying to persuade him to go ahead and tell us his story about what happened on July the 8th, 1975, over at Mrs. Inez Phillips' home in Gladewater.*

After approximately 15 minutes, Roach left and McLeroy re-entered.[5] The only salient testimony regarding the content of this portion of interrogation was elicited on cross examination from McLeroy:

> A: -- subject then told me orally, *I said to him, I said, "You don't need a couple of days to get this straight.* You know right now, today, as to whether or not you could pass a polygraph test; isn't that correct?" He said, "Yes."
>
> Q: All right. What brought up the couple of days? Why did you say, "You don't need a couple of days?" Hadn't Mr. Faulder told you that he wanted a couple of days to think --
>
> A: I overheard him tell Roach or Elliott that he needed a couple of days.

After approximately 15 minutes, McLeroy left and Elliott came back into the room with appellant for about 15 minutes. According to Elliott,

> A: I went back in and talked to him again briefly, myself.

---

[5]It is unclear whether Ranger Elliott did not witness all or only portions of McLeroy's second interview with appellant.

Q: All right. And what then occurred?

A: Well, *he still said that he just would like to think about it and get it all a little bit clearer in his mind, all the details*, and this was about the only thing that he said about the crime to me. He indicated, as I said, testified before, that he had knowledge, *but he just wasn't quite ready to discuss it.*

After Elliott left, Roach re-entered the room. It was about 4:30 p.m. According to Roach, appellant had at this point made no incriminating statements, and had given no indication that he wanted to talk with anyone about his involvement in the murder. Roach took into the polygraph room a pad of paper on which he had written the date: "July 8, 1975." Roach testified that he then turned the note pad around and wrote the names of six people, names he had obtained from Elliott. He questioned appellant about each item on the paper. Roach state, "when I got to the name Stormie Summers, Stan sat there for a minute. He said, 'I can't at this time tell you about it, but if you'll give me a piece of paper, I'll try to write it down'." Roach provided the requested items and appellant wrote one long paragraph.[6] Roach continued, "He handed the paper to me. He told me to read it and said, 'After you read this I think I can talk to you about it'."

After Roach read the paragraph, he brought appellant out of the polygraph room into McLeroy's outer office and went outside to his car to get Gregg County statement and waiver forms. Back inside, Roach filled out the waiver, read it to appellant, handed it to appellant and had appellant recite a line of the content

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[6]All three officers testified that appellant wrote "one long paragraph." However, this writing, identified as State's Exhibit No. 4, reveals two short paragraphs.

in order to confirm that appellant was literate. Appellant signed the waiver of rights form.

Appellant then drew a diagram of the house in which the capital murder occurred and began relating the details of the offense. Roach chronicled the events by hand, had it typed, and at 7:22 p.m., after appellant had both been read the statement, including warnings at the top, and had himself read the statement, he signed, dated and wrote down the time on it. Ranger Elliott testified that appellant "seemed relieved."

Appellant, as well as the three law enforcement witnesses, testified that he had been advised of his rights several times through the day, that he understood his rights, that he had been allowed to drink, smoke and use the restroom, that no firearms had been displayed, no overt threats were used [7] and that appellant was in no way mistreated. Additionally, it is uncontradicted that appellant had refused to involve himself in the murder and never gave any indication that he wanted to talk about his involvement during what was described by the witnesses as "continuing interrogation." The officers all agreed that they had not "taken" appellant's statements regarding "needing a couple of days. . ." as a request to stop interrogation, but rather, an expression of his lack of desire to give a final statement at that time.[8] On cross examination, the prosecutor asked appellant whether the "real" reason for his having wanted "a couple of days" was that he was wondering "who all" to implicate. Appellant acknowledged that this had been a

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[7]Appellant did testify that McLeroy had discussed with him the prison social structure in which McLeroy allegedly told him that he would be the object of sexual assaults. McLeroy, however, testified that he did not "recall" such a conversation but conceded that he "could have" had it.

[8]A reason offered by Elliott for this interpretation was that appellant continued to answer his questions. Elliott admitted, however, that appellant gave him no incriminating information.

consideration but denied that it was the prime reason.[9] Appellant was asked why he signed the statement and he replied that he thought it was the only way to "get out of there." The prosecutor asked appellant, "Did you tell them I'd like to think about it and get it clear in my mind before I sign that page [of the statement] after you read it?" Appellant replied, "I spent the whole afternoon telling them that and it didn't do any good."

In *Miranda*, supra, the Supreme Court of the United States expressed its concern for the atmosphere of custodial interrogation of criminal suspects, in which no overt physical coercion nor patent psychological ploys have been applied. Identifying as its goal the specification of proper limitations upon custodial interrogations, the Court set out procedural requirements to be therein employed by law enforcement officials. The Court made clear the necessity of advising persons criminally accused of their right against self-incrimination and their right to counsel, and the requirement that once a defendant invokes a *Miranda* right, all interrogation must cease. Stated the Court at 1612 S.Ct.:

> The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, *if the individual* is alone and *indicates in any manner* that *he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions* or volunteered some statements on his own *does not deprive him of*

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[9]Appellant testified that one reason was that he wanted legal advice.

> *the right to refrain from answering any further inquiries until* he has consulted with an attorney and thereafter *consents to be questioned.*

In *Michigan v. Mosley*[10], supra, the Supreme Court was confronted with a question as to whether the *Miranda* guidelines had been violated where the accused invoked his right to remain silent regarding some robbery offenses, and after a two hour interval, on being again advised of his rights, implicated himself in an unrelated homicide. The Court stated in this regard:

> "A reasonable and faithful interpretation of the Miranda opinion must rest on the *intention of the Court* in that case *to adopt 'fully effective means* . . . to notify the person of his right of silence and *to assure that the exercise of the right will be scrupulously honored* . . . .' [citations omitted] The *critical safeguard* identified in the passage at issue *is a person's 'right to cut off questioning.'* [citations omitted] *Through the exercise of his option* to terminate questioning *he can control the time at which questioning occurs, the subjects discussed, and the duration of* the *interrogation.* The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting. We therefore conclude that the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his 'right to cut off questioning' was 'scrupulously honored'." *Mosley* at 326 S.Ct.

Where the facts are in dispute, the trial court is the sole judge of the credibility of the witnesses and the

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[10]Hereinafter cited as *Mosley.*

weight to be given their testimony; however, the threshold question presented here is not one regarding credibility of the interrogating officers, nor of the good faith of the officers in their subjective interpretations of appellant's uncontradicted assertions of wanting "to wait a couple of days . . .," but whether appellant "in any manner" invoked his right to remain silent and, if so, whether such right was "scrupulously honored."

We believe that the inescapable conclusion from the verbatim testimony of the law enforcement officers recited *ante*, is that appellant did "indicate" in "some manner" his "desire" to invoke his right against self incrimination. Appellant's refusal to incriminate himself in some three hours of continuous interrogation is an additional circumstance which corroborates his assertion that his statements of "needing" or "wanting a couple of days . . ." were *intended* to *indicate* in *some manner* that he was invoking his right to remain silent. Further support for this conclusion is found in testimony showing that Captain Roach deemed it necessary to try to "*persuade* [appellant] to go ahead and tell . . . his story about what happened . . .," as well as that Marvin McLeroy felt obliged to argue with appellant about his need for a couple of days. [See, *ante*, at 6.]

Finally, it is clear that even if we agreed with the officers' asserted interpretation of appellant's statements - that he was *not* requesting that interrogation cease, but rather, expressing his desire to wait a couple of days before giving a final statement - no different conclusion would be impelled. In Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977),[11] the Supreme Court concluded that the accused's "statements . . . that he would tell the whole story *after* seeing [his lawyer] were the clearest expressions by Williams himself that he desired the

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[11]Hereinafter cited as *Brewer*.

presence of an attorney before any interrogation took place." *Brewer* at 1242 S.Ct. [Emphasis original.] See also Hearne v. State, 534 S.W.2d 703 (Tex.Cr.App. 1976).

Likewise, we are unpersuaded by the State's assertion that appellant's *reason* for "wanting a couple of days..." was to give him time to decide "who all" to implicate. Even if this were established by the record, which it is not, there is nothing inherent in such a consideration which negates the accused's desire to refrain from incriminating *himself.*

We hold that this appellant did *indicate* to the interrogating officers that he wished to invoke his right against self incrimination, and there is no dispute that thereafter, the interrogation did not cease. Accordingly, appellant's right was not "scrupulously honored" and the guidelines specified by *Miranda* were thereby violated. *Brewer*; *Mosley*; Ochoa v. State, 573 S.W.2d 796 (Tex.Cr.App. 1978); *Hearne v. State*, supra.

The State nevertheless urges that appellant ultimately waived his Fifth Amendment right and his statement was thereby rendered admissible. The State points to the facts found by the trial court that appellant never requested an attorney and never stated: "I request that the interrogation cease," or words to that specific effect. Furthermore, according to the State's assertion, appellant signed two documents entitled "Waiver of Rights Form" -- one at 2:30 p.m. and another at 5:47 p.m. -- which reflect his acknowledgement that he was given all warnings required by *Miranda*; additionally, when appellant signed the typed statement admitting his guilt, such statement included a specific waiver of his rights. Finally, the State assigns great significance to the fact that appellant, after approximately three hours of interrogation advised Captain Roach that "I can't at this time tell you about it, but if you'll give me a piece of paper, I'll try to write it down," citing North Carolina v.

Butler, ___ U.S. ___ , 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979).[12]

In *Butler*, the accused refused to sign a waiver of rights form offered him by F.B.I. agents at the outset of interrogation. Upon ascertaining that Butler understood his rights, the agents advised him they would like to talk, and the accused replied "I will talk to you but I am not signing any form." Thereafter Butler incriminated himself. The Supreme Court discussed the concept of waiver at length: "[In *Miranda*] this Court said that

> If the interrogation continues without the presence of an attorney [a request for which invoked the Fifth Amendment right to silence *per se*] and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self incrimination and his right to . . . counsel. [citations omitted]

Further interpreting *Miranda's* waiver prescriptions the Court in *Butler* continued at 1757 S.Ct.:

> An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but *is not inevitably* either necessary or *sufficient to establish waiver. The question is not one of form*, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case. As was unequivocally said in *Miranda*, mere silence is not enough. That does not mean that the defendant's silence coupled with an understanding of his rights and a

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[12]Hereinafter cited as *Butler*.

> course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. *The courts must presume that a defendant did not waive his rights; the prosecution's burden is great*; but in at least some cases waiver can be *clearly* inferred from the actions and words of the person interrogated.

The Court concluded that "the question of waiver must be determined on 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.' Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed.2d 1461 . . . ." *Butler* at 1758. See also Fare v. Michael C., ___U.S. ___, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979).[13]

Initially we observe that the trial court found as a fact that appellant waived his constitutional rights.[14] The question of waiver, however, is not a question of fact, but an issue of Federal Constitutional Law. *Brewer*. It is apparent then that the trial court applied an incorrect constitutional standard in determining the issue of waiver by which this Court is not bound. *Id.*

Applying these principles to the circumstances of this case, it is clear that the State has failed to meet its "great" burden of showing a relinquishment of the right

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[13]Hereinafter cited as *Fare*.

[14]Also found as a fact was that appellant waived his rights under Article 38.22, V.A.C.C.P. As a conclusion of law in these regards, the trial court stated:

> "Joseph Stanley Faulder, after repeated warnings, knowingly, intelligently, and voluntarily waived his rights under Art. 38.22, V.A.C.C.P., including his right to counsel, and his right to remain silent, prior to and during the making of the statement."

to silence on the part of this appellant. The only evidence of waiver contained in this record is the appellant's signed confession which included a waiver recitation at the top, and which followed his statement that he could not talk about it, but would "try to write it down."

Miranda teaches that no weight is to be given a failure on the part of the accused to specifically request an attorney's assistance or that interrogation cease in the exact language of that case, or, for that matter, at all; likewise, "the mere fact" that appellant answered the officers' questions raises no presumption of waiver. Here, appellant indicated his intention to invoke his Fifth Amendment right soon after the outset of interrogation, but was denied a "full and fair opportunity to exercise that option." See *Miranda*; cf. *Mosley*. Unlike *Mosley* the case before us is one "where the police failed to honor a decision . . . to cut off questioning . . . by refusing to discontinue the interrogation upon request [and] by persisting in repeated efforts to wear down [appellant's] resistance and make him change his mind." *Id.* at 327 S.Ct. In contrast to the circumstances shown by both *Fare* and *Butler*, there has been no showing that appellant "*clearly*" indicated a willingness to waive his constitutional right against self incrimination.

Having found no evidence to support the trial court's finding that appellant did not invoke his Fifth Amendment right against self incrimination, and having rejected the standard applied by the trial court in concluding that the State met its burden of proving appellant waived such right, we hold that the trial court committed reversible error through its failure to suppress appellant's statement obtained in violation of his right to remain silent.

The State's motion for rehearing is overruled.

CLINTON, Judge

(Delivered February 6, 1980)

EN BANC

JOSEPH STANLEY FAULDER, Appellant

No. 60,554, v. Appeal From Gregg County

THE STATE OF TEXAS, Appellee

DISSENTING OPINION ON STATE'S MOTION FOR REHEARING

The prior dissenting opinion is withdrawn.

The majority overrules the State's motion for rehearing on the ground that appellant asked the officers for two days to get things straight in his mind before talking to them. Appellant testified that the reason he did not want to talk at that time was that he did not know who to involve in the crime. When he later determined that the officers knew who were involved in the crime, he was ready to confess. He wrote the confession in his own handwriting.

The Supreme Court of the United States has held that the totality of the circumstances should be considered in determining if a confession were voluntarily made. His reason to remain silent no longer existed when he found out that the officers knew the others who were involved. He then voluntarily wrote the confession in his own handwriting.

The majority does not apply the holdings of North Carolina v. Butler, ___ U.S. ___ ,99 S.Ct. 1755, 60 L.Ed.2d 286 (1979), and Fare v. Michael C., ___ U.S. ___, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979), which are the most recent Supreme Court interpretations of *Miranda*.

In *Butler*, the defendant was interrogated by FBI agents in New York concerning a North Carolina robbery. The agents established that the suspect had an eleventh grade education and was literate. He then was given the Bureau's "Advice of Rights" form. The defendant stated that he understood his rights but he refused to sign the waiver at the bottom of the form. The

agents then stated that they would like to talk with him further, and he replied: "I will talk to you but I am not signing any form." He then made inculpatory statements.

In holding the inculpatory statements admissible, the Supreme Court stated:

> "An express written or oral statement of waiver of the right to remain silent or of the right to counsel is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver. The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case. As was unequivocally said in *Miranda*, mere silence is not enough. That does not mean that the defendant's silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights. The courts must presume that a defendant did not waive his rights; the prosecution's burden is great; but in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated. [footnote omitted]
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> ". . . This is not the first criminal case to question whether a defendant waived his constitutional rights. It is an issue with which courts must repeatedly deal. Even when the right so fundamental as that to counsel at trial is involved, the question of waiver must be determined on 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.' Johnson v. Zerbst, 304

U.S. 458, 464. See also United States v. Washington, 431 U.S. 181, 188; Schneckloth v. Bustamonte, 412 U.S. 208; Frazier v. Cupp, 394 U.S. 731, 739."

In Fare v. Michael C., supra, a juvenile was warned of his rights under *Miranda v. Arizona*. He asked if he could have his probation officer present. The officers did not get his probation officer and the juvenile confessed. The Supreme Court of the United States reversed the Supreme Court of California which had held that the request for the probation officer to be a per se violation of the minor's Fifth Amendment rights in the same way the request for an attorney was found in *Miranda* to be, regardless of what the interrogation otherwise might reveal.

The Supreme Court discussed North Carolina v. Butler, supra, and held that the asking for the probation officer did not invoke *Miranda*. The Court applied the totality of the circumstances test and held the confession to be admissible.

In the present case, Faulder did not ask for an attorney; he asked for time " . . . to get it straight" and then confessed in his own handwriting.

On Friday, April 22, 1977, Captain Bill Roach of the Gregg County Sheriff's Department gave appellant the standard *Miranda* warning. Appellant stated that he understood his rights and did not want an attorney. He did agree to take a polygraph test concerning the murder in question.

On Monday, April 25, 1977, Roach, Texas Ranger Glenn Elliott and appellant arrived in Tyler at approximately 2:00 p.m. for the polygraph examination. Appellant then declined to be tested. Marvin McLeroy, the polygraph examiner, testified that after appellant's refusal he terminated the test and asked appellant, "Would it be all right if I interviewed

him pertaining to this particular case myself. Subject indicated to me that it would. At that point in time, before any questions were asked, I told him the standard *Miranda* warning, read it to him, and subject read it and signed it." He signed the waiver form three times.

McLeroy informed appellant that the police were planning to question him regarding the instant murder. After a fifteen minute interview, McLeroy left and Ranger Elliott continued the interview at 2:30 p.m. Elliott initially read appellant his rights again. "During this talk, the defendant indicated to me that he would like a couple of days to get this straight in his mind, and I talked to him." This need to get things straight was brought up twice by appellant, and during cross-examination Elliott agreed that he took it to mean that appellant wanted to wait a couple of days in regards to giving a statement about the murder. Appellant never asked any of the officers to stop questioning him and all of them testified that appellant was fully cognizant of his rights.

Elliott's first interview lasted thirty minutes and he was followed by Roach who also initially questioned appellant for thirty minutes. McLeroy, Elliott and Roach all interviewed appellant a second time. Each officer warned appellant before conducting the interview.

Later, Roach read a list of names to appellant. In a situation very similar to that in the *Butler* case, appellant told Captain Bill Roach of the Gregg County Sheriff's Department that "I can't at this time tell you about it, but if you'll give me a piece of paper, I'll write it down for you." Thereafter, appellant confessed his participation in the murder in his own handwriting.

Roach left and returned with confession forms. Appellant was brought into the reception area of the building at 5:00 p.m. and signed the waiver of rights form at 5:47 p.m. He read aloud the portion of the waiver

regarding his right to counsel and initialed it. Appellant then drew a diagram of the victim's house while the statement was typed. The statement was read by appellant, read to him by the officers and he was given an opportunity to make corrections before signing it. The confession was signed at 7:22 p.m. Two of the five hours appellant was in Tyler were consumed by appellant giving the details of the confession and typing it.

During the interview appellant had been allowed to smoke cigarettes, drink coffee and use the bathroom. Although the most of the interview occurred in the polygraph room which is relatively secluded, that office was accessible to the other departments at the Tyler DPS office including: Weight and Motor Vehicle Inspection, Narcotics, Intelligence, Auto Theft, Rangers, Patrol, Laboratory and Driver's License. The bathroom used by appellant was in a hall by the driver's license facility and "some citizens were coming in and out of the area."

Roach stated that each time he orally warned appellant he asked appellant if he understood his rights. The officers testified that appellant never requested to see an attorney nor did he ask that the questioning cease. Appellant received his *Miranda* warnings six times during the interviews.

Appellant, on the other hand, testified that he requested an attorney while being interviewed and remembered telling the officers he needed time to think about things. He said he made these requests "ten or twelve times." He admitted that he had not asked for an attorney when he was brought in front of a magistrate prior to and the day after his confession. He conceded that it was possible that he had received warnings from Roach and Elliott. He stated that he understood his rights and knowingly signed the confession.

The polygraph room in which the interview was

conducted is equipped with a one-way mirror, an intercom and a polygraph machine on a table in the middle of the room. As noted above, although somewhat secluded, it was fairly accessible to other areas of the building. It was not a hidden room as described in the original opinion. No weapons were exhibited during the interview.

In the opinion on original submission, speaking of the officers, it is written:

> "All three ignored the request to remain silent and chose to continue interrogation."

There is no testimony to that effect. It is a conclusion on the part of the writer.

There is disputed testimony concerning appellant's request for a lawyer. Appellant testified that he stated that he wanted a lawyer. Three officers testified that he never stated that he wanted a lawyer and one testified that appellant stated that he did not want a lawyer.

There is no evidence of a "hidden room." This was shown to be a room where the polygraph operator had the machine and when the confession was given it was outside in the lobby of the office of the polygraph operator.

The justice of the peace warned appellant of his *Miranda* rights. Captain Roach warned him of his rights and that he had a right to stop the interview at any time. Appellant agreed to take the lie detector test.

Roach mentioned Stormie Summers' name and that of another person. Appellant said, "I can't talk about it but if you will give me a pencil and a piece of paper I can write it down", and later he stated that the reason he wrote it down was because he had to think about what he wanted to put in the confession. He stated that he really wanted to see who he would involve in the confession.

The names given him by Captain Roach were some of those that were involved in the discussion or in the commission of the crime.

Roach read the confession aloud and all of appellant's rights were listed on it. Appellant then read the warning which contained the statement that he could end it at any time and he signed his name. Appellant had an opportunity to make changes in the confession and he did so. Appellant testified that he knew he had a right to a lawyer and knew that he had a right to stop the conversation and that he had a prison record.

Concerning the taking of the polygraph examination, McLeroy testified that he told appellant not to take the test unless he thought he could pass it. After that, appellant refused to take the test.

There is no statement in the record that he asked to remain silent or that he asked them not to interrogate him. He said that he wanted a couple of days to get it straight in his mind. With the above qualifications, that he wanted to see who he would involve in the confession and that he had rather write it down than to tell it, it goes to the totality of the circumstances that he never demanded to end the interrogation, that he never asked to end the interview, that he never indicated that he wished to end the interview.

After he read what he had written down personally, he said that he thought he could talk about it then.

Appellant testified that he knew that he had a right to a lawyer; that he could stop the interrogation at any time and he understood the other rights; that he did not request the appointment of an attorney. He admitted that he told Roach that "I can't talk to you about it but I will write it down"; that it was easier to write down than it was to talk about it.

After he refused to take the polygraph examination,

he was asked by McLeroy if he wanted to talk about it. He replied: "I just as well talk to you. I've talked to just everybody else." McLeroy testified that appellant freely talked to him but he did not readily admit his implication.

When one reads the record and under the totality of the circumstances, the refusal to take a lie detector test is not a request for the interrogation to cease. It should be remembered that the operator of the polygraph machine stated to the appellant not to take the test unless he thought he could pass it. Then immediately thereafter appellant said that he might as well talk to him (the operator) because he had talked to everyone else.[1]

It appears that the two days that he wanted to get it straight in his mind was not a request to stop the interrogation but apparently to not implicate all the people that were involved in the burglary and homicide. In North Carolina v. Butler, supra, Butler told the officers: "I will talk to you but I'm not signing any form." The Court held in that case that the totality of the circumstances showed that he waived his rights. The Court held:

> "... [B]ut in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated."

and

> "... 'the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the

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[1]Since there is a different interpretation in the evidence relied upon by the majority and in this opinion, a more detailed statement of the testimony with references to the page numbers is set out as an appendix.

> accused.' Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461. See also United States v. Washington, 431 U.S. 181, 188, 97 S.Ct. 1814, 1819, 52 L.Ed.2d 238; Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854; Frazier v. Cupp, 394 U.S. 731, 739, 89 S.Ct. 1420, 1424, 22 L.Ed.2d 684."

In Fare v. Michael C., supra, the Supreme Court of the United States applied the totality of the circumstances test. The juvenile who was on probation at the time asked to see his probation officer. The Supreme Court held that there was sufficient evidence under the totality of the circumstances to show that he waived his right to remain silent.

In Williams v. State, 566 S.W.2d 919 (Tex.Cr.App. 1976), this Court held that although under the totality of the circumstances the State must prove "an intentional relinquishment of a known right," an express waiver is not required. See Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975); Moreno v. State, 511 S.W.2d 273 (Tex.Cr.App. 1974). Where the facts are in dispute, the trial judge as the fact finder can accept or reject all or any part of the testimony of any witness, including the defendant. Williams v. State, supra; McKittrick v. State, 541 S.W.2d 177 (Tex.Cr.App. 1976).

The majority has not only refused to reexamine this case in light of North Carolina v. Butler, supra, and Fare v. Michael C., supra, but its opinion goes so far as to hold the vague and ambiguous statement about a need to "get things straight in my mind" by a defendant fully cognizant of his rights renders a subsequent confession inadmissible. This is contrary to the two recent United States Supreme Court cases cited above and to sound reasoning.

The State's motion for rehearing should be granted and the judgment should be affirmed.

Douglas, Judge

(Delivered February 6, 1980)

En Banc

Dally, J., and W.C. Davis, J., join in this dissent

APPENDIX

I. Chronological Summary of Facts

Wednesday and Thursday, April 20 and 21, 1977

Appellant was arrested and returned to Longview on a warrant issued in connection with an unrelated theft case. He arrived in Longview at about 9:00 p.m., April 20. (463) At 10:30 a.m. the following morning, appellant was taken before J.P. Charles Cashell and given his magistrate's warning. (231) Appellant testified at the suppression hearing that he understood his rights at this time and that he did not request a lawyer because he felt that he did not need one. (484)

Friday, April 22, 1977

At 9:10 a.m., appellant met with Deputy Bill Roach and Ranger Glen Elliott in Roach's office in the Gregg County Courthouse. Prior to any discussion, appellant was advised of his Miranda rights. (282, 417) According to the officers, appellant's rights were discussed at length and he answered negatively when asked if he wanted a lawyer. (283, 343, 418) The officers discussed the theft case briefly, then informed appellant he was a suspect in this capital murder case. This interview lasted until 10:43 a.m. (288, 418) Appellant agreed to take a polygraph test, and an appointment for the test was made. (286) Appellant's version of this interview conforms with that of the officers. (486-491)

Monday, April 25, 1977

Elliott, Roach, and appellant left Longview at 1:00 p.m. and drove to Department of Public Safety headquarters in Tyler where the polygraph test was to take place. (288, 418) They arrived at about 1:45. (327, 363) Appellant was placed in a lock-up for a few minutes while Elliott and Roach briefed Marvin McLeroy, the polygraph operator. (291, 363)

McLeroy's office consisted of a large outer office, in which his desk was located, and two smaller adjoining rooms. The polygraph was in one of these rooms. The other room was an observation room; the polygraph room was wired for sound and there was a two-way mirror. (292) Throughout the afternoon, only one officer was in the polygraph room with appellant at any given time; the other two were usually in the observation room.

Appellant was brought to the polygraph room at about 2:00 p.m., and McLeroy began his "pre-test interview," consisting of various personal questions. (363) McLeroy then explained the test to appellant, and advised him not to take it if he was guilty or if he had any information that he wanted to conceal. (367) Appellant then told McLeroy that he did not want to take the test. This had taken about 30 minutes, which would make the time 2:30. (395)

Up to this point, there is no dispute between the officers and appellant as to the events on April 25.

After appellant refused the test, McLeroy "asked the subject would it be all right if I interviewed him pertaining to this particular case, myself. Subject indicated to me that it would. At that point in time, before any questions were asked, I told him the standard Miranda warning, read it to him, and subject read it and signed it (a waiver of rights form, SX 8, 1479)." (368, lines 18-24) McLeroy asked appellant if he needed a lawyer, and appellant said, "No." (371, 403) McLeroy and appellant then talked until about 3:00; appellant's answers to McLeroy's questions were uninformative. (372, 394, 366)

McLeroy left the polygraph room at 3:00 and Elliott entered. (294, 372) Elliott again informed appellant of his rights, and talked to appellant for about thirty minutes. (294, 373) During this conversation, appellant told Elliott, "I need a couple of days to get it all straight,"

or words to that effect. (296, 329) This interview lasted about thirty minutes. Elliott then left and Roach entered the polygraph room; the time would now be about 3:30. (296, 375)

Roach also talked to appellant for thirty minutes. (375) Before he began, he also informed appellant of his rights. (343, 421) During these first conversations with Elliott and Roach, appellant was questioned generally about his activities and associates at the time of the murder. (295, 296)

At 4:00, McLeroy reentered the polygraph room, followed by Elliott at 4:15 and Roach at 4:30. It is not clear from the record whether the three officers again advised appellant of his rights before beginning their second conversations. (299, 300; 375, 376,; 422) During his second conversation with Elliott, appellant again said he needed time to think and get it all clear in his mind. (299)

As of 4:30, when Roach entered the polygraph room for the second time, appellant had made no incriminating statements. (409) During this second conversation, Roach showed appellant a list of names he had written on a note pad and asked him about each of the names. "When I got to the name Stormie Summers, Stan sat there for a minute. He said, 'I can't at this time tell you about it, but if you'll give me a piece of paper, I'll try to write it down.' " (424, lines 4-7; also 301, 376) Roach gave appellant a pen and paper, and he wrote a short two-paragraph statement (SX 4, 1454) describing the events at the Phillips house from the time appellant and Summers entered until he hit the deceased with the blackjack. (304, 376, 424) Appellant handed Roach this statement and said, "After you read this I think I can talk to you about it." (425, lines 10 and 11; also 307)

It was now approximately 5:00 p.m. (332) Roach immediately went to his car for waiver of rights and

custodial statement forms. (427) Meanwhile, appellant was moved to McLeroy's outer office so that all three officers could observe his statement. (307, 377, 427) Roach filled out a waiver of rights form and read it to appellant. Appellant then read the waiver and signed it at 5:47 p.m. (SX 5, 1476, 308, 309; 377, 378; 428) Appellant was again asked if he wanted an attorney; he replied that he did not. (308, 453, 454)

After signing the waiver, appellant drew a rough diagram of the Phillips house. (SX 6, 1326; 310, 430) Then appellant dictated his confession to Roach. (SX 7, 1348; 314, 379, 432) After the statement was typed, appellant read it, initialed some corrections, and signed it; the time was 7:22 p.m. (316, 380, 433). The entire statement, including the printed warning at the top of the first page, was read to appellant before he signed. (316, 380, 433)

McLeroy, Elliott, and Roach repeatedly testified that appellant never asked for an attorney and never asked that the interrogation be ended. Elliott and Roach testified that they did not interpret appellant's statement that he needed time to think as a request for all questioning to cease. (330, 452)

Appellant testified that after McLeroy explained the polygraph examination, he told McLeroy that he wanted a lawyer and would not take the test until he could talk to a lawyer. (464) He also testified that Elliott and Roach did not advise him of his rights and that he repeatedly asked that the questioning be stopped and an attorney appointed. (469, 470, 472, 476). Appellant was not able to recall clearly when he signed the two waivers, but admitted that the signatures were his. (474, 500, 502)

On cross-examination, appellant admitted that one reason he needed time to think was to give him time to decide who else to involve in the murder, but asserted that it was also to allow him to get legal counsel. (384)

Appellant also admitted making the statement "I can't talk about it, but I can write it down," and then making the first handwritten statement. (495, 501) Appellant stated that he signed the formal confession only because he thought that "it was the only way to get out of there." (505, lines 24, 25)

Tuesday, April 26, 1977

Appellant was taken before Judge Cashell to receive his magistrate's warning with regard to the murder charge. Appellant did not request an attorney. (519)

Timetable For Monday Afternoon, April 25, 1977

2:00 McLeroy begins pre-test interview.

2:30 Appellant declines test, but agrees to talk; signs first waiver of rights.

3:00 Elliott begins first conversation; gives Miranda warning. Appellant says he needs time to "get things straight."

3:30 Roach begins first conversation; gives Miranda warnings.

4:00 McLeroy returns.

4:15 Elliott returns; appellant again says he needs time to think.

4:30 Roach returns with list of names; appellant says he can't talk, but he will write it out.

5:00 Appellant indicates he is ready to talk about the murder; is moved to outer office and again advised of rights.

5:47 Appellant signs second waiver of rights; begins confession.

7:22 Confession signed.

APPENDIX B

NO. 60,554

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

JOSEPH STANLEY FAULDER	§	STATE'S MOTION FOR LEAVE
	§	TO FILE SECOND MOTION
	§	FOR REHEARING AND
V.	§	MOTION TO STAY MANDATE
	§	PENDING APPLICATION FOR
THE STATE OF TEXAS	§	WRIT OF CERTIORARI TO THE
	§	U.S. SUPREME COURT
	§	AND
	§	APPELLANT'S MOTION
	§	FOR LEAVE TO FILE
	§	PETITION FOR WRIT OF
	§	PROHIBITION

ORDER

The State's Motion for Leave to File Second Motion for Rehearing is denied.

The State's Motion to Stay Issuance of Mandate Pending Application for Writ of Certiorari to the U.S. Supreme Court shall be filed in this Court and be set for submission to the Court En Banc on March 26, 1980. Oral argument may be requested.

Appellant's Motion for Leave to File Petition for Writ of Prohibition is granted and said Petition for Writ of Prohibition shall be filed in this Court and be set for submission to the Court En Banc on March 26, 1980. Oral argument may be requested.

It is so ordered this 26th day of February, 1980.

PER CURIAM

En Banc

(Judges Odom and Phillips dissent to the filing and setting of the State's Motion to Stay the Mandate and Appellant's Petition for Writ of Prohibition.)

APPENDIX C

JOSEPH STANLEY FAULDER, Appellant

NO. 60,554 vs. Appeal from Gregg County

THE STATE OF TEXAS, Appellee

JOSEPH STANLEY FAULDER, Relator

Ancillary to No. 60554 vs. Original Application for Writ of Prohibition

ODIS R. HILL, CRIMINAL DISTRICT ATTORNEY, GREGG COUNTY, Respondent

OPINION

Appellant Faulder was convicted of capital murder and received the death penalty. On appeal this Court reversed the conviction. The State, by and through Gregg County Criminal District Attorney Hill has filed a motion to stay the mandate of reversal in order that review may be sought in the United States Supreme Court pursuant to 28 U.S.C. Sec. 1257(c). Faulder has filed an application for writ of prohibition to prevent Hill from seeking such review.

The power of this Court to issue writs of prohibition is granted in Art. 5, Sec. 5, of the Texas Constitution:

> "Subject to such regulations as may be prescribed by law, regarding criminal law matters, the Court of Criminal Appeals and the Judges thereof shall have the power to issue the writs of habeas corpus, mandamus, procedendo, prohibition, certiorari, and such other writs as may be necessary to protect its jurisdiction or enforce its judgments."

The function of a writ of prohibition was stated in State ex rel. Vance v. Clawson, 465 S.W.2d 164, 168:

> "It has been said that 'a writ of prohibition is that process by which a superior court prevents inferior courts, tribunals, officers, or persons from usurping or exercising jurisdiction with which they have not been vested.' 73 C.J.S. Prohibition Sec. 1, p. 9."

If the State, through the office of its Criminal District Attorney of Gregg County, is preparing to seek review of this Court's decision in Faulder's case, and if such action is beyond the jurisdiction or power of that office, then a writ of prohibition would be available to prevent such an usurpation of authority.

Faulder argues the proposed action by Hill is outside the power of his office because of the prohibition of Article 5, Sec. 26, of the Texas Constitution, which provides:

> "The State shall have no right of appeal in criminal cases."

Faulder also relies on the similar provision of the Code of Criminal Procedure, Art. 44.01, and on the plurality dictum and concurring opinion in White v. State, 543 S.W.2d 366.

Hill replies with the argument that by virtue of the supremacy clause of the United States Constitution, Article VI, the provision of the Texas Constitution relied on by Faulder must yield to 28 U.S.C. Sec. 1257(c), which provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> ". . .
>
> "(3) By writ of certiorari, . . . where any

> title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

We reject at the outset the notion that the supremacy clause and Sec. 1257(c) play a significant role in the analysis of whether a writ of prohibition should issue. The federal statute relied on by Hill is concerned with the jurisdiction of the Supreme Court to hear a case, i.e., with the power of that Court. We do not, nor could we, propose to rule on what cases that Court may or may not hear. The issue raised by Faulder, in contrast, is not one of the power of the Supreme Court, but of the power of the Criminal District Attorney of Gregg County.

Before jurisdiction may be exercised, it must be legally invoked. State v. Olsen, 360 S.W.2d 398, 400. Faulder challenges the capacity of the Criminal District Attorney, as a state officer, to invoke the jurisdiction of any court to review a criminal case. The powers of that office, argues Faulder, are restricted by the provision of the Texas Constitution which declares "The State shall have no right of appeal in criminal cases."

A simple example should illustrate the distinction between questions of the power of the Supreme Court to hear a case and the power of the State prosecutor to request that Court to exercise jurisdiction. It is well established that a party to a law suit, including a defendant in a criminal case, may waive the right of appeal, as well as many other rights and protections. If the party waives that right, then his attorney is without authority to pursue the appeal even though courts exist with jurisdiction to hear an appeal in the case, if brought before it. Denial to the attorney by the client of the power to seek review is wholly distinct and independent of the power of the reviewing court to hear the case. See generally Gilmore v. Utah, 429 U.S. 1012, 97 S.Ct. 436, 50 L.Ed.2d 632 (1976). If Art. 5, Sec. 26, supra, were

construed as an instruction to the attorneys representing the State in criminal cases, from their client, the people of Texas, that the purpose for which they are retained does not include seeking an appeal, i.e., as an instruction that they shall not appeal in criminal cases, the parallel to our example of waiver would be complete. The parallel, however, is drawn here merely for purposes of illustrating the distinction between the issue of the jurisdiction of the Supreme Court, and the issue of authority of the prosecuting attorney under State law. Having sharpened that distinction, we reiterate that the former issue is not in this case, and move on to the latter.

Faulder's argument, simply stated, is that this is a criminal case, action by respondent seeking review of his case by the Supreme Court would constitute an appeal, and the express prohibitions of Art. 5, Sec. 26, supra, and Art. 44.01, V.A.C.C.P., would be violated by such action on the part of respondent Hill. The plurality dictum expressed in White v. State, supra, correctly concluded, and respondent does not dispute, that a case such as this one is a criminal case, and that review of the case, whether denominated an appeal, a writ of error, a writ of certiorari, or any other name, is still an appeal. Beyond this part with which we agree, the plurality in *White* concluded "that a petition for certiorari in the Supreme Court in a case such as this one is an appeal of a criminal case," and therefore prohibited by Art. 5, Sec. 26, supra. Today we reach a different conclusion, based on the scope of the prohibition of Section 26, as considered in light of the constitutional context of that prohibition.

Article 5 of the Texas Constitution is entitled "Judicial Department." It establishes the structure, powers, and responsibilities of the judicial branch of the State of Texas. As such, it is addressed to the derivation, characteristics, and internal relations of that system, and does not speak to the relation of that system or a part

of that system to entities beyond, such as the federal judiciary. In this context, we construe the outer limits of the prohibition of Section 26 to be a restriction on the permissible operations within the Texas judicial system. This holding on the outer limits of the scope of Sec. 26 is sufficient to support our conclusion that no violation of that provision would occur by respondent filing application for writ of certiorari in the Supreme Court to review our decision in appellant-relator's case. Consequently, in deciding this case it is unnecessary to make further examination of Sec. 26 with respect to the exact scope of its restriction within the Texas judicial system.

For these reasons, we hold Art. 5, Sec. 26, of the Texas Constitution does not prohibit respondent from seeking review of our decision in this case by application for writ of certiorari in the Supreme Court of the United States. The application for writ of prohibition is denied.

It is the practice of this Court to issue a stay of mandate for thirty days when review of a decision of this Court is sought by an unsuccessful appellant in a death penalty case. We similarly issue such a stay in this case. The motion to stay the mandate is granted for thirty days.

It is so ordered.

ODOM, Judge

(Delivered July 2, 1980)

En Banc

JOSEPH STANLEY FAULDER, Appellant

No. 60,554, v. Appeal from Gregg County

THE STATE OF TEXAS, Appellee

JOSEPH STANLEY FAULDER, Relator

JOSEPH STANLEY FAULDER, Relator
Ancillary to No. 60,554, v. Original Application for Writ of Prohibition

ODIS R. HILL, Criminal District Attorney, Gregg County, Respondent

CONCURRING OPINION

I concur for the reasons in the dissent to the plurality opinion in White v. State, 543 S.W.2d 366, 370 (Tex.Cr.App. 1976), on remand from the Supreme Court of the United States.

The question is answered in 1914 in Harrison v. St. Louis & S.F.R. Co., 232 U.S. 318, 34 S.Ct. 333, 58 L.Ed. 621.

The St. Louis and San Francisco Railroad Company was a corporation chartered under the laws of Missouri. It operated in interstate commerce and had hundreds of miles of railroads in Oklahoma. In 1980 the company was sued by a resident of Oklahoma in a state court. On the ground of diversity of citizenship the railroad company filed to remove the case to a federal court. The acting Secretary of State for Oklahoma under a state statute declared the license of the railroad company forfeited because it had filed to remove the case to federal court. The Supreme Court wrote:

> "It may not be doubted that the judicial power of the United States as created by the Constitution and provided for by Congress pursuant to its constitutional authority is a power wholly independent of state action, and

> which therefore the several states may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit, or render inefficacious. *The doctrine is so elementary as to require no citation of authority to sustain it.* Indeed, it stands out so plainly as one of the essential and fundamental conceptions upon which our constitutional system rests, and the lines which define it are so broad and so obvious, that, unlike some of the other powers delegated by the Constitution, where the lines of distinction are less clearly defined, the attempts to transgress or forget them have been so infrequent as to call for few occasions for their statement and application." (Emphasis supplied)

It can be readily seen that the Texas Constitutional Provision as construed by the dissenters would prevent the State of Texas seeking relief upon a federal question as the Supreme Court wrote in the Harrison case the judicial power of the United States as created by the Constitution of the United States is a power wholly independent of state action and the states may not destroy, abridge or limit that power.

The dissenting opinion in the present case would have sounded more reasonable after Texas had seceded from the United States and before the questions were settled in the war between the states, but that war has been over for quite a few years and we are now a part of the United States. The Constitution of the United States applies to all states.

The Constitution of the State of Texas can no more prevent the State from seeking relief in our federal courts than it could prevent a defendant in a criminal case from seeking to exert a federal right in a federal court.

There has been some hesitancy on the part of prosecutors to exert the rights of citizens of Texas to the highest court of our land because of the plurality opinion in White v. State, supra. It would be helpful for that court to say again what it said in the Harrison case.

Douglas, Judge

(Delivered July 2, 1980)

En Banc

JOSEPH STANLEY FAULDER, Appellant

NO. 60,554 v. Appeal from GREGG County

THE STATE OF TEXAS, Appellee

JOSEPH STANLEY FAULDER, Relator
Ancillary to No. 60554 v. Original Application for Writ of Prohibition

ODIS R. HILL, Criminal District Attorney, Gregg County, Respondent

CONCURRING OPINION

I concur in the result reached by the majority; however, I am unwilling to concede that "appeal" as used in Art. 5, Sec. 26 of the State Constitution includes review by writ of error or writ of certiorari.

DALLY, Judge

(Delivered July 2, 1980)

En Banc

JOSEPH STANLEY
FAULDER, Relator

[Ancillary to No. 60,554] vs. Original Application for Writ of Prohibition

ODIS R. HILL, Criminal District Attorney, Gregg County
Respondent

CONCURRING AND DISSENTING OPINION

I.

A majority of the Court apparently agree on the threshold questions in this case: that this Court has jurisdiction to issue a writ of prohibition, that petitions to the Supreme Court for writs of certiorari are "appeal[s] in criminal cases,"[1] and that this case involves the constitutional powers of the State of Texas rather than the supremacy clause in Article VI of the United States Constitution.[2] With these holdings I concur. On the remaining, crucial question the Court is unable to speak with a majority voice.

II.

"The State shall have no right of appeal in criminal cases." Texas Constitution, Article V, Section 26. I believe that this provision means what it says. White v. State, 543 S.W.2d 366 (Tex.Cr.App. 1976)(opinion of Roberts, J.). Its meaning has been accepted for a hundred years. When a constitutional provision is so clear and unequivocal, and its meaning is so well settled, its apparent command should be overridden by only the most compelling considerations. The majority have not

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[1]Only Judge Dally does not agree with this holding.

[2]Only Judge Douglas does not agree with this holding.

advanced any compelling argument to support their result.

The opinion for a plurality[3] of three judges would hold that Article V, Section 26, applies only to appeals among the courts of our state. And what is the support for this assertion? It is that,

> "Article 5 of the Texas Constitution is entitled 'Judicial Department.' It establishes the structure, powers, and responsibilities of the judicial branch of the State of Texas. As such, it . . . does not speak to the relation of that system or a part of that system to entities beyond, such as the federal judiciary.

Of course, that assumes the very thing that is at issue: whether part of Article V does speak to the relation of Texas to the federal judiciary. In logic this fallacy is called *petitio principii* -- begging the question. Even on its own terms the argument fails. Consider Article IV of our Constitution; it is entitled "Executive Department," and it establishes the structure, powers, and responsibilities of the executive branch of the State of Texas. Nonetheless it does speak to the relation of that system to entities beyond; see Texas Constitution, Article IV, Section 10.[4] The drafters of the Constitution evidently did not think that the title "Executive

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[3]If "plurality" were used in its root sense of "more," the true plurality would be the four dissenting judges who share a common view that Section 26 forbids further appeal. By custom "plurality" also refers to the opinion on the prevailing side which has the most support. In this case, as in White v. State, 543 S.W.2d 366 (Tex.Cr.App. 1976), the leading opinion does not have majority support on the meaning of our constitution; to borrow Judge Odom's phrase, it is "plurality dictum."

[4]"[The Governor]. . . shall conduct, in person, or in such manner as shall be prescribed by law, all intercourse and business of the State with other States and with the United States."

Department" limited the scope of Article IV to intrastate matters; why should the title "Judicial Department" limit the scope of Article V? That would be to decide an important constitutional question on irrelevant, superficial grounds.

Even worse, the plurality opinion ignores the will of the people who adopted the Constitution of 1876. If today's plurality opinion were followed, the State would be forbidden to appeal a directed verdit of not guilty (for example) to this Court, but it could appeal to the Supreme Court of the United States. Can the plurality believe that the Constitution of 1876, which declares in its very first section that "the maintenance of our free institutions and the perpetuity of the Union depend upon the preservation of the right of local self-government, unimpaired to all the States," was designed to allow the State to turn to a federal court more easily than to the state courts? Can the plurality believe that the voters of 1876, who had lately seceded from the United States and who were repealing the reconstruction Constitution of 1869, intended to submit to a federal court questions which they would not entrust to their state courts? The plurality opinion ignores this history, as it ignores the century of agreement on the meaning of the plain words in Section 26. Its reasoning does not even support, much less compel, its result.

A fourth judge reiterates his view which he expressed in White v. State, 543 S.W.2d 366, 370 (Tex.Cr.App. 1976)(opinion of Douglas, J.), that states have federally-created rights to appeal which cannot be denied even by their own constitutions. He is alone in that view of constitutional law. Harrison v. St. Louis & S.F.R.R., 232 U.S. 318 (1914) is irrelevant. There a state tried to prevent a separate entity (a corporation) from exercising its right to litigate in federal court. Had the corporation simply chosen not to litigate, no federal question would have been presented. The question

before us is whether the State of Texas has chosen, in its Constitution, never to appeal a criminal case. No separate entity would be prevented from doing anything;[5] the question is one of internal choice, not external coercion as in *Harrison.*

The final opinion that would deny the writ of prohibition does not concede that "appeal" as used in Section 26 includes review by writ of certiorari. Because that opinion is the deciding one, it effectively determines the law. Our holding today, therefore, is that the State can petition the United States Supreme Court for a writ of certiorari; we have not decided whether the State can appeal. In effect the meaning of our state constitution turns on the procedural vagaries of Title 28 of the United States Code. I cannot believe that the Constitution of 1876 was intended to grant or deny an organic power on such an extraneous basis.

An important constitutional question has come before us. The Court has effectively rewritten our constitution, without the approval of the voters, by accumulating two inadequate reasons and one misunderstanding of constitutional law. This is not a bright day in the history of this Court.

To the denial of the writ of prohibition, I dissent.

ROBERTS, Judge

DELIVERED: July 2, 1980

EN BANC

[5]Misunderstanding of this elementary fact is revealed in the concurring opinion's statement: "The Constitution of the State of Texas can no more prevent the State from seeking relief in our federal courts than it could prevent a defendant..." This is to speak of the State as though, like a defendant or a railroad, it were an entity apart from the Constitution of the State of Texas. The question cannot be whether the State has an inherent power which it is being prevented from using; it is whether Article V, Section 26, means that it is without a power to appeal this case.

JOSEPH STANLEY
FAULDER, Relator

[Ancillary to No. 60,554] vs. Original Application for Writ of Prohibition

ODIS R. HILL, Criminal District Attorney, Gregg County, Respondent

DISSENTING OPINION

Courts are reluctant to decide constitutional questions and they should be passed on only when raised and when the necessity arises. 12 Tex.Jur.2d, Constitutional Law, § 14, p. 362. I am convinced there is no necessity to pass on the constitutional question here involved. A statute answers the question. Further, if the constitutional question is to be reached, I have concluded the majority opinion, which ignores the rules of constitutional construction and uses artificial and simplistic reasoning, is wrong, dead wrong. For these reasons, I dissent.

The relator, Faulder was convicted of capital murder and received the death penalty. On appeal his conviction was reversed in a 6-3 decision because his extrajudicial confession, which was admitted into evidence, was obtained in violation of his Fifth Amendment, United States Constitution, rights, and in violation of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975), and cases decided by this court. See also Article 38.22, V.A.C.C.P.

The State, by and through its Criminal District Attorney of Gregg County, the Honorable Odis R. Hill, has filed a motion to stay this court's mandate of reversal in order that the State may obtain review of this court's decision in the United States Supreme Court pursuant to 28 U.S.C., §1257(c). Respondent Hill is candid. He makes no pretenses, and by pleading and oral argument makes clear he wants to appeal the decision of this court.

Relator Faulder has filed an application for a writ of prohibition to prevent Hill from seeking such review. Relator relies upon Article V, §26 of the Texas Constitution and Article 44.01, V.A.C.C.P., which prohibit appeal by the State in criminal actions or cases.

Germane to this discussion is the official oath prescribed by the Texas Constitution (Article XVI, §1), which the Respondent Hill and the members of this court have taken. It prescribes in part:

> "I . . . will to the best of my ability *preserve, protect, and defend the Constitution and laws* of the United States and *of this State*; . . . ." (Emphasis supplied.)

The remedy sought by the relator is a writ of prohibition. Under the 1977 amendment to Article V, §5 of the Texas Constitution this court, subject to such regulations as may be prescribed by law, has, "regarding criminal law matters," the power to issue writs of prohibition and the same is not limited to a writ necessary to protect this court's jurisdiction or enforce this court's judgment. Thomas v. Stevenson, 561 S.W.2d 845 (Tex.Cr.App. 1978)(Concurring Opinion).

In Vance v. Clawson, 465 S.W.2d 164, 168 (Tex.Cr.App. 1971), this court stated:

> "It has been said that 'a writ of prohibition is that process by which a superior court prevents inferior courts, tribunals, officers, or persons from usurping or exercising jurisdiction with which they have not been vested.' 73 C.J.S. Prohibition §1, p. 9."

It seems that if the Respondent Hill in his official capacity as the Criminal District Attorney of Gregg County is seeking, as he claims, an appeal or review of this court's decision in the *Faulder* case, and if such action is beyond the jurisdiction or power of his office,

then a writ of prohibition would be available to prevent such a usurpation of authority.

Next to be considered is whether the action the Respondent Hill seeks to take -- review of this court's judgment by writ of certiorari in the United States Supreme Court -- is an appeal in a criminal action or case. There can be no question but that the offense of capital murder, V.T.C.A., Penal Code, §19.03, for which Relator Faulder was tried and convicted and assessed the death penalty, is a penal offense. And it is further noted his appeal was to this court, which is the only court in the state with appellate jurisdiction in all criminal cases. Article V, §5, Texas Constitution. Thus, there is no quarrel that we are dealing with a criminal action or case.[1] Is, however, the action sought to be taken by Respondent Hill an "appeal"?

Long prior to the adoption of the 1876 Constitution the Supreme Court of the Republic of Texas in Republic v. Smith, Dallam, 407, 408, 409, defined an appeal as "a complaint to a superior court of injustice done by an inferior one." See also Cottrell v. Board of County Commissioners of Paulding County, Ohio, 24 Ohio N.P., N.S. 281.

Certiorari is a remedy well known to common law as a writ issued from a superior court directing an inferior court to transmit to it the record of some proceedings for review. Zamora v. Garza, 117 S.W.2d 165 (Tex.Civ.App. - San Antonio, 1938); City of San Angelo v. Boehme Bakery, 144 Tex. 281, 190 S.W.2d 67 (1945); Ashworth v.

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[1]In Ex parte Wolters, 144 S.W. 531 (Tex.Cr.App. 1911), this court quoting from Taylor v. Goodrich, 25 Tex.Civ.App. 109, 40 S.W. 515, 524 (1897), stated:

> "A 'criminal case' is defined to be an action, suit, or cause instituted to secure a conviction and punishment for crime, or to punish an infraction of the criminal law."

Hatcher, 98 W.Va. 323, 128 S.E. 93 (1924). In Shapleigh Hardware v. Brumfield, 159 Miss. 175, 130 So. 98 (1930), it was held that certiorari is an appellate proceeding for reexamination of the action of an inferior tribunal. And it has been said appeal and certiorari are analogous proceedings. Curry v. Terrell, 1 White & W., Civ. case, Ct.App., §239.[2]

And in White v. State, 543 S.W.2d 366, 368 (Tex.Cr.App. 1976), the plurality opinion stated in part ". . . it seems clear that a petition for certiorari, like a writ of error in Texas practice, is an 'appeal,' albeit a discretionary one. Hart v. State, supra (13 Tex.App. 555, Galveston Term 1883) . . . Durham v. United States, 401 U.S. 481, fn. at 483, 91 S.Ct. 858, 28 L.Ed.2d 200 (1971). To say that review by certiorari does not constitute an appeal is to make a distinction without substance, since such a review necessarily involves an attempt to persuade a superior court to correct the error of the lower court."

The Respondent Hill admits the action he seeks to take is an appeal, and I do not understand the majority to question that the action the respondent seeks to take is an appeal.[3]

There does not appear to be any question that what the Respondent Hill seeks to do is to appeal a criminal action or case.

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[2]In Gould v. Klabunde, 63 N.E.2d 258, 262, 326 Ill.App. 643 (1945), it was held an "appeal" is a review by a superior tribunal, the method of which review may be called either "certiorari" or "appeal."

[3]Judge Dally in a brief concurring opinion is, however, unwilling to concede that "appeal" as used in Article V, § 26 of the State Constitution includes review by writ of certiorari, but regrettably he does not elaborate.

Article 44.01, V.A.C.C.P. (1965), found in Chapter 44 of the Code of Criminal Procedure, entitled "Appeal and Writ of Error," provides:

> "The State shall have no right of appeal in criminal actions."

This article has remained unchanged at least since Article 836 of the 1879 Code of Criminal Procedure which was enacted by the 16th Legislature on February 21, 1879 and became effective July 24, 1879. Said Article became Article 871 in the 1895 Code of Criminal Procedure, Article 893 in the 1911 Code of Criminal Procedure and Article 812 in the 1925 Code of Criminal Procedure. Thus, the voters of this state, through their elected representatives, have for over a hundred years repeatedly re-affirmed by statute independent of any constitutional provision a broad, firm public policy that the State shall have no right to appeal in criminal actions.

The language in the statute is definite, direct, simple and unambiguous, eliminating any need for judicial construction. The statute legally blocks Respondent Hill's efforts to seek review in the United States Supreme Court by writ of certiorari in this court's decision in the *Faulder* case. For this reason and for this reason alone the writ of prohibition should issue. This should end the matter.

The majority, however, ignores the precedent that courts should avoid deciding constitutional questions unless the necessity arises. It rushes to judgment and decides the constitutional question with only a mention and absolutely no consideration of Article 44.01, V.A.C.C.P., in the decision making process. Surely the statute must be considered in some way before the majority agrees that the application for writ of prohibition should be denied. The bench and the bar, and if you please, the public, are at least entitled to this

much.

Since the 5-4 majority decides the question on the basis of the state Constitution without regard to the statute, this necessitates showing why that decision, independent of the statute, is even in error.

Article V, §26, Texas Constitution, provides:

> "The State shall have no right of appeal in criminal cases."

The Interpretive Commentary to said constitutional provisions provides a brief history of the right of the State to appeal in criminal cases. It state in part:

> "Although the present Texas constitution denies the state *any appeal whatever*, an examination of earlier constitutions reveals that there has been no consistent regard for the defendant in this respect. The Constitution of the Republic of Mexico charged the General Congress with the duty of prescribing the procedure of the courts in criminal matters. The Constitution of 1836 of the Republic of Texas merely provided that the common law should be the rule of decision in criminal cases. The first state constitution left the matter of criminal procedure to the legislature, and the legislature in providing for criminal appeals did not confer a right of appeal upon the state until 1856.
>
> "Although the Constitution of 1845 provided that a defendant could not be again put on trial for the same offense after a verdict of not guilty, the provision adopted in 1856 permitted the state to appeal from a sustained exception of the defendant to the indictment or information and from a sustained motion of the defendant in arrest of judgment.

> "The provisions of the Constitution of 1845 were incorporated into the Constitution of 1861. The statute of 1856, permitting a limited appeal by the state, ceased to be operative upon the adoption of the Constitution of 1869, following which the prosecution was afforded a right to appeal apparently equal to that accorded the defendant in felony cases. This development was of brief duration, however, inasmuch as the present restriction came into being with the adoption of the Constitution of 1876." (Emphasis supplied.)

The constitutional prohibition represents a broad and firm public policy that has endured for over one hundred years with due observance from its public officials in accordance with their constitutional oath except for the aberration that is White v. State, supra. It is stated in definite, plain, simple and unambiguous language and is easily understandable. It needs no judicial construction. It has long been considered as prohibiting any and all kinds of appeal by the State in criminal cases. Citing the constitutional provision 5 Tex.Jur.2d, Appeal and Error -- Criminal, § 16, p. 37, states, "The State has no right of appeal in *any criminal case*." (Emphasis supplied.) And the article "Should the State Have an Appeal in Criminal Cases?" 1 S.W.L.J. 152 (1947) viewed the constitutional provision as denying "the state any appeal *whatsoever*."

The Constitution is the fundamental law containing the principles on which the state government rests, regulating the three branches of government, and directing how each department shall exercise its powers. Texas National Guard Armory Board v. McCraw, 132 Tex. 613, 126 S.W.2d 627 (1939). The provisions of the Constitution, unless the contrary appears therefrom, are mandatory and not merely directory. Ex Parte Anderson, 46 Tex.Cr.R. 372, 81 S.W. 973 (1904). The courts and prosecutors must be

obedient to its commands; Ex parte Anderson, supra, and neither executive officers nor the judiciary can lawfully act beyond the constitutional limitations. Traveler's Ins. Co. v. Marshall, 76 S.W.2d 1007 (Tex. 1934).

Turning to the rules of constitutional construction, it is observed that constitutional provisions which are not ambiguous and are not open to more than one construction or interpretation must be given their full effect without regard to the consequences. Cramer v. Sheppard, 167 S.W.2d 147 (Tex. 1942); Rawlins v. Drake, 291 S.W.2d 349 (Tex.Civ.App. - Dallas 1959); Bexar County Hospital District v. Crosby, 320 S.W.2d 247, 253 (Tex.Civ.App. - San Antonio 1958); Keller v. State, 87 S.W. 669 (Tex.Cr.App. 1905); Koy v. Schneider, 110 Tex. 369, 218 S.W. 479, 221 S.W. 880 (Tex. 1920). And constitutional provisons will not be construed to be ambiguous and contradictory if such construction is avoidable. Holman v. Broadway Improvement Co., 300 S.W.15 (Com.App. 1927). And when the signification of a phrase or clause is plainly discoverable from the words thereof, there is no reason to resort to rules of construction and effect should be given to the meaning thus ascertained. Words will be considered to have been used in their natural sense and ordinary significance unless the context indicates the contrary. 12 Tex.Jur.2d, Constitutional Law, § 14, pp. 362-363. The language used must be presumed to have been carefully selected and the words used are to be understood as people generally understood at the time of the adoption of the Constitution. Cramer v. Sheppard, 167 S.W.2d 147 (Tex. 1942); City of Amarillo v. Love, 356 S.W.2d 325 (Tex.Civ.App. - Amarillo 1962), err.ref.n.r.e.; Leander Ind.Sch.Dist. v. Cedar Park Water Sup. Corp., 479 S.W.2d 908 (Tex. 1972). See Markowsky et al. v. Newman et al., 136 S.W.2d 808 (Tex. 1940). And if a term appears to have received a judicial construction prior to its use in a constitutional

provision, the inference is that it bears this signification. 12 Tex.Jur.2d, Constitutional Law, § 14, p. 363; Carr v. Tucker, 42 Tex. 330 (1875).[4]

It seems clear to this writer that the meaning of said §26 of Article V is plainly discoverable from the words themselves and there is no reason to resort to rules of construction to ascertain the meaning.[5] It should be given effect as written for when the meaning of the language selected by the framers of a constitution is clear, this controls the court in interpreting it. Ex parte Myer, 207 S.W. 100 (Tex.Cr.App. 1918).

It is also noted that whenever the language employed in a constitution is prohibitory, such as in § 26 of Article V, it is intended to be a positive and unequivocal negation. Ex parte Anderson, 46 Tex.Cr.R. 372, 81 S.W. 973 (1904).

Strong as a conclusion may be drawn from the plain and unambiguous language of a constitutional provision it may still derive support from other sources. It is an historical fact that for over a hundred years courts and lawyers, law professors and the public have viewed and construed the prohibition against the State's right to appeal in a criminal case as being absolute and as applying to any type of appeal. Thus where there has been acquiescence in a practical construction for a long period of time this should be a safe guide as to the proper

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[4]As earlier noted, the word "appeal" had received a judicial construction prior to the adoption of the 1876 Constitution. In Republic of Texas v. Smith, Dallam 407 (1840), the Supreme Court of the Republic defined an appeal as a "complaint to a superior court of injustice done by an inferior one."

[5]If the drafters of a new Constitution sought to prohibit the State's right of appeal in criminal cases, how could plainer language be found than is now contained in Article V, § 26 of the present Constitution?

interpretation. See and cf. Walker v. Baker, 196 S.W.2d 324, 327 (Tex. 1946).[6] General public acceptance of and acquiescence in a certain construction of the Constitution extending over a long period of time gives rise to the doctrine that affords to such acceptance persuasiveness akin to precedent. Sheppard v. San Jacinto Junior College Dist., 363 S.W.2d 742 (Tex. 1962).

> "A constitution should receive a consistent and uniform interpretation, so that it is not to be taken to mean one thing at one time and another thing at another time when the circumstances may have so changed as perhaps to make a different rule in the case seem desirable." 12 Tex.Jur.2d, Constitutional Law, § 17, p. 365.

The primary rule of interpreting and construing the Constitution is to ascertain the intention of the people in adopting it and give effect to that intention. Cox v. Robison, 150 S.W. 1149 (Tex. 1912); Collingsworth County v. Allred, 40 S.W.2d 13 (Tex. 1931); Ferguson v. Wilcox, 28 S.W.2d 526 (Tex. 1930); Farrar v. Bd. of Trustees of Emp. Retirement System of Tex., 243 S.W.2d 688 (Tex. 1951). The meaning of a Constitution is fixed when it is adopted and is not different at any subsequent time. Cox v. Robison, supra; Jones v. Ross, 173 S.W.2d 1022 (Tex. 1943). And in interpreting the Constitution courts may look to the conditions existing at the time of adoption, general spirit of times, and prevailing sentiment. Mumme v. Marrs, 40 S.W.2d 31 (Tex. 1931).

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[6]In Walker v. Baker, supra, it was noted that where for 100 years the State Senate did not construe the State Constitution as conferring on it power to convene at will to consider Governor's recess appointment gives weight to the construction that the Constitution does not authorize.

The courts, in construing the Constitution, must give effect to the intent of the people in adopting it as found in the instrument itself, and it will be presumed that the language thereof has been employed with sufficient precision to convey such intent, and where such presumption prevails nothing remains except to enforce such intent. Holley v. State, 14 Tex.App. 505 (1883).

Turning to 1876 we find that the people of Texas had only recently gone though a war among the states, witnessed the occupation of the state by federal troops, endured a Reconstruction Era with its carpetbaggers, and had briefly experimented with the unlimited right of appeal by the State in criminal cases. By constitutionally prohibiting the State the right of appeal in criminal cases, it is obvious they were disenchanted with their experiment. It is reasonable to assume under the circumstances of the times that the framers of the Constitution and then the voters intended to prevent prosecutors from appealing within their own state judicial system and yet somehow to permit these same prosecutors the right to appeal the same state criminal cases to the United States Supreme Court? It is not reasonable, in fact it is absolutely unreasonable, to so conclude, given the spirit of the times. And certainly a constitutional provision must be reasonably construed in a manner not repugnant to common sense. First National Bank v. City of Port Arthur, 35 S.W.2d 258 (Tex.Civ.App. - Beaumont 1931). Further, my research has failed to reveal that it was ever the practice of state prosecutors at the time to appeal state criminal cases to the United States Supreme Court even when the State had the unlimited right of appeal.

Without any claim that the constitutional prohibition is ambiguous, without resort to any rules of construction, without consideration of the history of the times and without any citation of authority or precedent, the majority simply states that since the constitutional prohibition, age 104, is found in that

portion of the Constitution entitled "Judicial Department" that the prohibition on appeals by the State is a restriction only within the state judicial system. What the majority overlooks is that in every earlier state constitution there was a division thereof entitled "Judicial Department" and the mere fact that the prohibition was placed for the first time under "Judicial Department" in the 1876 Constitution cannot be said, without more, to be an adoption of a public policy of a limited prohibition of the right of the State to appeal in criminal cases. In order to reach the desired result, the majority has by its own edict amended the Constitution by adding to § 26 of Article V the words "within the state judicial system." I find no justification for such action.[7]

It is not for courts to undertake to amend or rewrite the Constitution by judicial decision. Rawlins v. Drake, 291 S.W.2d 349, 350 (Tex.Civ.App. - Dallas 1956). Only the people can do that. Moore v. Edna Hospt. Dist., 449 S.W.2d 508 (Tex.Civ.App. - Corpus Christi 1969), ref.n.r.e. Those called upon to construe the Constitution are not authorized to read into the Constitution language not contained therein or by construing the Constitution differently from its plain meaning. Cramer v. Sheppard, 167 S.W.2d 147 (Tex. 1942). Constitutional provisions may not be bent to meet a beneficent purpose however noble the design may be. Ex parte Smythe, 120 S.W. 200 (Tex.Cr.App. 1909). Courts are not to be concerned with the wisdom or lack of wisdom of a constitutional provision and need not exert their ingenuity to find reasons to thwart the intention of the people as clearly expressed in the

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[7]This is a classical example of raw judicial power--pure muscle.

Constitution. Carpenter v. Sheppard, 145 S.W.2d 562 (Tex. 1940).[8]

Even if it can be seriously argued that the prohibition in § 26 of Article V of the Texas Constitution is limited to the state judicial system, Respondent Hill still faces the hurdle of Article 44.01, V.A.C.C.P. Even if he can successfully bypass that barrier without violating his official oath, then by what authority does he have the right to "appeal" to the United States Supreme Court? There is no constitutional or statutory authority permitting such an "appeal," and a common law appeals by the State were unknown. See United States v. Sanges, 144 U.S. 310, 312 (1892).

If the majority today establishes the right to the State to appeal criminal cases to the United States Supreme Court, then it will have opened Pandora's box. Every state trial court order granting a motion to suppress evidence will raise the possibility of an "appeal" direct to the United States Supreme Court for 28 U.S.C., § 1257(c), authorizes reviews of final judgments or decrees rendered by the highest court of a state in which a decision could be had. While prohibition against appealing would still apply within the state judicial

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[8]It is true that appellants in this court apply almost weekly by applications for writ of certiorari to the United States Supreme Court after a decision of this court, and there is no question of their right to do so. It may seem unfair that the State cannot do so likewise. Our Constitution and laws must be changed only, however, in the manner prescribed by law and not by judicial whim. As a legislator, I would vote to give the citizens an opportunity to change the Constitution in this regard (review by the United States Supreme Court). Today we must vote as judges and not as legislators, however. We must follow the Constitution and the laws as written. And further, we must avoid a grandstand play designed to win popular support today for a position opposed by a constitutional provision adopted over a century ago or any other time.

system, the wraps would be off as far as applying to the United States Supreme Court from such orders as the orders would be rendered by the highest court of the state in which a decision could be had. Speedy trials will not be speedy and the finality of judgment in a criminal case will again be lengthened.

For the reasons stated, I dissent.

ONION, Presiding Judge

Roberts, J., joins in this dissent except for the discussion of Article 44.01, V.A.C.C.P.

(Delivered July 2, 1980)

En banc

JOSEPH STANLEY FAULDER, Appellant

NO. 60,554 v. Appeal from GREGG County

THE STATE OF TEXAS, Appellee

JOSEPH STANLEY FAULDER, Relator

Ancillary to No. 60,554 v. Original Application for Writ of Prohibition

ODIS R. HILL, CRIMINAL DISTRICT ATTORNEY, GREGG COUNTY, Respondent

DISSENTING OPINION

The determination by the Constitutional Convention of 1875 to take from the State its right of appeal in criminal cases and impose a constitutional prohibition against an appeal by the State in such cases was made in light of historical experiences with a variety of treatments prescribed by preceding constitutions and laws. Thus, as one researcher has reported:[1]

> "The Texas experience began with the Constitution of the Republic of Mexico, which charged the General Congress with the duty of prescribing court procedure in criminal matters. The 1836 Constitution of the Republic of Texas merely provided that the common law should be the rule of decision in criminal cases. The first state constitution in 1845 delegated matters of criminal procedure to the legislature, but it provided that a defendant could not be tried again for the same offense after a verdict of not guilty. In 1856 the legislature granted to the State a statutory right of appeal in two limited circumstances.

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[1]Tschoepe, "Limited Right of Appeal for the State," 14 Hou. L.R. 735 at 736; see also Interpretive Commentary following Article V., Section 26, 2 Vernon's Texas Constitution 323 at 325-326.

> The 1861 constitution incorporated the provisions of the 1845 constitution, but the statute of 1856, which permitted limited appeal by the State, became inoperative with the adoption of the 1869 constitution. The Texas Constitution of 1869 apparently gave the State and the defendant equal rights of appeal in felony cases. However, this development was of brief duration because the present restriction came into being with the adoption of the 1876 constitution." [Footnotes omitted]

That the convention proposed and the people of Texas later adopted, for the first time ever in their own history, a specific denial of right of appeal to the State is clear expression of a considered and deliberate public policy. Speculation as to reasons for embedding that policy in a constitution, indulged in interestingly by our State's Attorney, is an academic exercise in futility for, as he has discovered, a contemporary "legislative history" is not reflected in the convention journals.[2] Yet, the uncontrovertible fact is that within a relatively brief span of seven years after the "Reconstruction Constitution" of 1869 gave the State and the defendant

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[2]However, a most tantalizing theory is suggested by the temper of the period and the contemporaneous holding of the Supreme Court of the United States in Twitchell v. The Commonwealth, 7 Wall. 321, 324, 19 L.Ed. 223 (1868) that statutory provisions for exercise of its appellate jurisdiction did not make any distinction between civil and criminal cases "in respect to the revision of the judgments of State courts by this spect to the revision of the judgments of State courts by this court," and its harsh and thorough denunciation of Confederate Texans in Texas v. White, 7 Wall. 700, 704-708, 722-732, 19 L.Ed. 227 (1868). See Daniel v. Hutcheson, 86 Tex. 62, 22 S.W. 933, 938 (1893) for an account of occupation of our State's courts by the federal military government until 1870, written by Chief Justice John W. Stayton who, perhaps no so coincidentally, had been a member of the 1875 Constitutional Convention that produced our Constitution of 1876.

"equal rights of appeal in felony cases, "[3] the people of Texas stripped the State of its equality in that respect. The State has remained unequal to this day - 104 years later.

A firm public policy, widely accepted and steadfastly sustained for that period of time against aggressive challenges, [4]earns for itself a degree of invulnerability that demands a considerable amount of respect from, as well as this Court, the Attorney General of Texas and the district and county attorneys who are its officers and legal representatives of the State within their respective bailiwicks. Each is, after all, a constitutional officer within the Judicial Department, Article V, Section 21,[5] except the Attorney General who is placed in the Executive Department by Article IV, Section 22.[6] The powers conferred by the Constitution upon them are exclusively theirs and the Legislature may neither assign those powers to others nor interfere with the

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[3]*Tschoepe*, supra, at 736, note 24.

[4]The most recent venture was undertaken in 1976. See *Tschoepe*, supra, 14 Hous.L.R. at 743, note 95, and accompanying text.

[5]"The County Attorneys shall represent the State in all cases in the District and inferior courts in their respective counties; but if any county shall be included in a district in which there shall be a District Attorney, the respective duties of District Attorneys and County Attorneys shall in such counties be regulated by the Legislature." As to those respective duties, see generally for a district attorney Articles 321 *et seq.*, especially 327, 332-341, V.A.C.S. and Article 2.01, V.A.C.C.P., and for a county attorney Articles 329 *et seq.*, especially 332-341, V.A.C.S. and Article 2.02, V.A.C.C.P.

[6]"The Attorney General. . .shall represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party. . .He shall. . .give legal advise in writing to the Governor and other executive officers, when requested by them, and perform such other duties as may be required by law." As to his duties, see generally Articles 4394-4413a, V.A.C.S.

right to exercise them, Maud v. Terrell, 109 T. 97, 200 S.W. 375, 376 (1918); Hill County v. Sheppard, 142 T. 358, 178 S.W.2d 261, 264 (1944). Despite that feature of exclusivity, however, there is "no authority to perform an act in respect to which no duty has been made to devolve upon him," Duncan v. State, 67 S.W. 903, 905 (Ct.Civ.App. 1902). As to our respondent, particularly, his duties are prescribed in Article 199 (124), V.A.C.S. and include, *inter alia*, the "duty to represent the State of Texas in all cases both criminal and civil in any and all cases *wherein it is the duty of a District Attorney to represent the State of Texas* that may arise in Gregg County . . .,"[7] *id.*, §21. Just as in the case of the Attorney General, we believe, powers and duties of attorneys for the State are "limited to those so prescribed, and may not be enlarged on by the courts," State v. Harney, 164 S.W.2d 55, 56 (Tex.Civ.App. - San Antonio 1942) error refused.

Given, then, that an "appeal" is "a complaint to a superior court of injustice done by an inferior one," Republic of Texas v. Smith, Dallam 407 (Tex. 1841) and, as our respondent and State's Attorney both concede, that a petition for writ of certiorari presented to the Supreme Court of the United States to review a decision of this Court is an appeal, the question is whether the proposed appeal to the Supreme Court by respondent offends the well settled public policy pointedly enunciated by Article V, Section 26, of the Constitution of Texas. In its rich historical context and the literal language of the prohibition, merely to pose the question is at once to answer it.

The prohibition is a self-imposed denial, succinct and direct, without qualification - it admits not exception or exemption. In another vernacular, the State of Texas

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[7]All emphasis is supplied throughout by the writer of this opinion unless otherwise indicated.

commands itself: "Thou shalt not appeal." Thus, as officers and agents of the State of Texas, its Attorney General, its district attorneys, its county attorneys and all other like officials with a representative capability are similarly shorn of that power and authority that their principal, the State of Texas, has denied to itself: the right of appeal in criminal cases.

The constitutional prohibition is initially implemented at the trial court level but remains operative throughout the appellate hierarchy. The public policy considerations underlying the constitutional determination are equally compelling at every stage of the appellate process. There has not been suggested a satisfactory rationale for removing the bar blocking appeal by the State from a trial court resolution of an issue adversely to the State so as to permit an appeal by the State from an appellate court resolution of an issue against it to a superior court.[8] In all reason, a State that has deprived itself of power and authority to appeal *ab initio* suffers the same deprivation *in extenso* until it has restored them to itself.

The State Prosecuting Attorney urges that Section 26 "does not purport to say what rights the State has to appeal in federal courts nor does it prohibit State

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[8]The plurality opinion construes "the outer limits of the prohibition of Section 26 to be a restriction on the permissible operations within the Texas judicial system" simply because Article V is entitled "Judicial Department" and "does not speak to the relation of that system or a part of that system to entities beyond, such as the federal judiciary." That analysis, if correct, dooms the proposed venture of our respondent for, as a constitutional officer within the Judicial Department, Neal v. Sheppard, 209 S.W.2d 388, 391 (Tex.Civ.App. - Texarkana 1948) error refused, he too is confined by Article V, Section 21, to performing such duties as therein and validly by the Legislature provided, *Neal v. Sheppard*, supra; Hill County v. Sheppard, 142 Tex. 358, 178 S.W.2d 261, 263 (1944). Appealing to the Supreme Court of the United States is not one of them.

officers from appeal into federal courts." But, as if not too confident, he then asks, "If it did, why is the State appealing so many federal habeas corpus cases?" The plain and simple answer to what does not seem to be a rhetorical question is that federal habeas corpus is civil in nature, Fay v. Noia, 372 U.S. 391, 423-424, n. 34, 83 S.Ct. 822, 9 L.Ed. 837 (1963), so that state officers do not take any such appeal denied them in criminal cases. Even more plain and simple, however, a constitutional statement that the State shall have no right to appeal in criminal cases purports to say just that - no right of appeal "period." Its purport is to deny that right of appeal to every appellate forum, anywhere, any place, any time.

Accordingly, the writ of prohibition should issue.[9]

CLINTON, Judge

(Delivered July 2, 1980)

EN BANC

Roberts, J. and Phillips, J. join

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[9]A writ that prohibits respondent in his official capacity of Criminal District Attorney from seeking review of our decision in this case does not, of course, preclude him or any other citizen, individually, from claiming "the right to seek certiorari. . .with or without the consent of the State whose judgment is sought to be reviewed," Ross v. Moffitt, 417 U.S. 600, 617 (1974), once he structures the proper lawsuit in an accessible court.